A

SASHI KUMAR SUPPIAH

v.

TIMBALAN MENTERI DALAM NEGERI MALAYSIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
SOFIAN ABD RAZAK J
[CRIMINAL APPLICATION NO: 44-171-2009]
24 MARCH 2010

C ***CRIMINAL LAW:*** *Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Section 4(1), detention under - Habeas corpus - Whether applicant denied right to be represented by counsel - Whether Board's refusal to call witnesses to be cross-examined by applicant violated art. 5(3) Federal Constitution - Whether applicant's challenge to*
D *appointment of Chairman and members of Board groundless*

CRIMINAL PROCEDURE: *Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under s. 4(1) - Whether applicant denied right to be represented by counsel - Whether*
E *Board's refusal to call witnesses to be cross-examined by applicant violated art. 5(3) Federal Constitution - Whether applicant's challenge to appointment of Chairman and members of Board groundless*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969,*
F *detention under s. 4(1) - Whether applicant denied right to be represented by counsel - Whether Board's refusal to call witnesses to be cross-examined by applicant violated art. 5(3) Federal Constitution - Whether applicant's challenge to appointment of Chairman and members of Board groundless*

G ***LEGAL PROFESSION:*** *Duty to client - Duty to make every effort to ensure appearance at day of hearing - Legal Profession (Practice and Etiquette Rules) 1978, rr. 6(a), 24(a)*

This was the *habeas corpus* application by the applicant detained
H pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'). The application was made on the grounds that: (1) the Advisory Board ('the Board') denied him his rights to be represented by counsel by refusing to grant a second postponement of his representation hearing as his counsel
I was engaged in another trial; (2) the Board, in refusing to call witnesses to be cross-examined by the applicant, violated art. 5(3)

of the Federal Constitution; and (3) the appointment of the Chairman and two members of the Board was not lawful thereby violating art. 151(2) Federal Constitution. A

Held (dismissing the application):

(1) The applicant did not indicate whether he wished to be represented by counsel in the relevant part of Form 1 pursuant to r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 ('the 1972 Rules') despite the explanation by the Tamil interpreter. By that omission, the applicant could not be said to have had the wish to be represented by counsel. Notwithstanding, the Board at its first hearing did postpone the hearing at the request of the applicant to enable him to engage a counsel. It was not a case that the Board had refused the applicant's request to do so. (paras 6-8) B C D

(2) There was nothing to indicate in the 1972 Rules that a request for postponement to the Board should be granted as a matter of right. The 1972 Rules did state the right of the applicant to be represented by counsel but was silent with regard to whether a request for postponement by counsel should be allowed. (para 12) E

(3) When there was no reply by the Board to the applicant's letter dated 19 May 2009 for the second postponement, counsel should have assumed that the Board had rejected it and due preparation for the hearing should have been made. Rules 6(a) and 24(a) of the Legal Profession (Practice and Etiquette) Rules 1978 respectively state that an advocate and solicitor should not accept any brief unless reasonably certain of being able to appear and represent his client on the required day and that an advocate and solicitor should make every effort to be ready for trial in the day fixed for trial. The learned counsel was clearly in breach of both Rules when he accepted the brief to represent the applicant on the day fixed for the hearing. Whilst it could be said that the applicant had a right to appoint a counsel of his choice to represent him, a request for a postponement was not a matter as of right. (paras 14-18) F G H

(4) Although the Board did not grant the second postponement of the hearing on 20 May 2009, the applicant did decide to appear in person at the hearing and did conduct his own case. In that I

A sense, the applicant was given the right to be heard before the Board and consequently there was no procedural non-compliance on the issue. (para 18)

(5) Section 9 of the Ordinance was silent as to the mode to be B adopted when the applicant wished to secure the presence of the recording officer as witness. Even if the applicant did not write to the Board to secure the presence of the recording officer, it sufficed that it was verbally intimated to the Board. However, the notes of proceedings did not reflect the name and address C of the recording officer. Therefore, it could be safely assumed that it was never intimated to the Board. (para 22)

(6) The Board could not be compelled to exercise the power of summoning the recording officer. The Board like any other tribunal was free to regulate its own procedure within the D constraints of the Federal Constitution and the statute. That included ensuring the proceedings before the Board was completed expeditiously and thus refusing an adjournment. The Board might also refuse to call witnesses such as the investigating officer to be cross-examined on the written E evidence from the victims, witnesses and information which was classified as confidential. On that basis, the presence of the applicant might not be allowed during the presentation of the facts with regard to the applicant's criminal activities. The presence of the applicant would tantamount to disclosing the F identity of the informer and thus compromise on its secrecy and national security. (paras 23-25)

(7) There was no obligation on the part of the Board to secure the presence of the witnesses sought by the applicant to be cross-G examined. If the applicant wished to cross-examine the recording officer, then he should make him available at the hearing which he did not do so. Even if the recording officer was present at the hearing, it was still up to the discretion of the Board on whether to call him to be cross-examined. As H such, there was no procedural non-compliance on the issue. (para 27)

(8) The onus was on the applicant to prove that the appointment of the Chairman and the two other members were not in I accordance with art. 151(2) Federal Constitution. The applicant also did not state the source of his belief that the appointment thereof was not in accordance with art. 151(2). If the source

was not disclosed, then his purported belief was based purely on conjecture without any legal basis and therefore not credible. (*SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors*; dist.) (para 30)

(9) Rule 10 of the 1972 Rules gave the Board the right to regulate its own procedure in respect of any matter not provided by the Rules. Rule 10(2) made it abundantly clear that the Board might have the discretion to determine whether any document or other information should or should not be made available or disclosed to a detained person and his advocate or either of them. The Board had taken a legal position that to disclose any document or other information to the applicant or his counsel would not be in the national interest and classified as an official secret. The court had no power to question the exercise of the discretion by the Board. It followed that there was no procedural non-compliance on the issue. (paras 31-32)

Case(s) referred to:

Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor [1998] 2 CLJ 749 HC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors [2009] 1 CLJ 686 FC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

PP v. Karpal Singh Ram Singh & Another Case [1988] 2 CLJ 587; [1988] 1 CLJ (Rep) 249 SC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Tan Eng Hoe v. Liang Hooi Kiang [1960] 1 LNS 135 CA ***(refd)***

'The Zamora' [1916] 2 AC 77 ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 9

Federal Constitution, arts. 5(3), 151(1)(a), (2)

Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a)

Public Order and Prevention of Crime (Procedure) Rules 1972, rr. 3(2), 10(2)

For the applicant - V Saravanan (Suresh Thanabalasingam with him); M/s Suresh Thanabalasingam

For the respondents - Mohd Zain Ibrahim SFC

Reported by Usha Thiagarajah

JUDGMENT

Sofian Abd Razak J:

[1] This is an application (encl. 1) by Sashi Kumar a/l Kumar (hereinafter called 'the applicant') for a writ of *habeas corpus ad subjiciendum*. The applicant is presently detained at the Pusat Pemulihan Akhlak Simpang Rengam, Johor by a detention Order dated 2 April 2009 issued by the Honourable Deputy Minister of Home Affairs (hereinafter called 'the Honourable Deputy Minister') and made pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter called 'the Ordinance'). The detention Order is for a period of two (2) years commencing 2 April 2009.

[2] The applicant advanced three (3) grounds to challenge the detention Order which will be dealt with *in seriatim*:

1) That there was procedural non-compliance with regard to the violation of art. 5(3) of the Federal Constitution by the refusal of the advisory board to grant an adjournment as to enable the applicant's counsel to represent the applicant on the appointed day;

2) That there was procedural non-compliance with regard to the violation of art. 5(3) of the Federal Constitution by the refusal of the advisory board to call witnesses to be crossed examined by the applicant;

3) That there was procedural non-compliance with regard to the violation of art. 151(2) of the Federal Constitution with regard to the appointment of the Chairman and members of the advisory board.

[3] The court on 12 February 2010 after perusing the affidavits filed herein and hearing oral submissions by both parties dismissed the applicant's application in encl. 1. The applicant who is dissatisfied with the said decision and has since filed an appeal. I hereby state the grounds for my decision.

First Issue

[4] Learned counsel for the applicant Mr. V. Saravanan submitted that the applicant is entitled to be represented at the hearing of the representation by a counsel. At the first hearing of the

representation before the advisory board (hereinafter called 'the Board') fixed on 22 April 2009, the applicant had sought a postponement to enable him to engage a counsel to represent him. The Board then adjourned the matter to 20 May 2009 whereupon the Board proceeded to hear the representation in the absence of the applicant's counsel. It was further submitted by learned counsel that prior to the hearing fixed on 20 May 2009, a letter dated 11 May 2009 requesting for a postponement was sent by fax on 12 May 2009 and by hand. On 19 May 2009 the same letter was again sent by hand and received by the Board. The reason for the said postponement was because the learned counsel for the applicant, En. Suresh Thanabalasingam would be engaged in a continued hearing in a criminal trial *vide* case number 45-49-2004 at the Kuala Lumpur High Court fixed from 18 to 22 May 2009. The Board was unable to accede to the said request and the hearing proceeded in the presence of the applicant who conducted the hearing himself and in the absence of his counsel. The learned counsel further stated that as a result of the refusal to grant a postponement had caused the applicant to conduct his case without proper knowledge and experience and therefore his rights to be represented by counsel is wilfully denied. In Form 1 pursuant to r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 the applicant had stated that he proposed to be represented by counsel at the hearing before the Board. Learned counsel for the applicant further state that applicant did not agree to proceed with the hearing of his representation and this could be verified if the notes of proceedings is made available to the applicant.

[5] The learned federal counsel, En. Mohd Zain bin Ibrahim for the respondents in reply submitted that no request for postponement was sought by the counsel for the applicant. Reference was made to para. 7 of encl. 24 which is the affidavit of Rosnah binti Abdul Aziz who was at all material times the Secretary of the Board affirmed on 28 December 2009. In any event it was further submitted that the applicant is well advised of his rights and privileges to make representation before the Board. In encl. 12 at para. 5, the rights and privileges of the applicant had been explained in Tamil by En. Allagappan a/l Nadarajan who was at the material time the Tamil interpreter at the hearing of the representation before the Board. The applicant had decided that he would conduct

A the hearing of the representation himself without the presence of his counsel. It was further submitted that the hearing of the applicant's representation was in accordance with the rules and procedures.

Finding Of The Court On 1st Issue

B **[6]** The court's observation is drawn to Form 1 pursuant to r. 3(2) as prescribed in the Schedule to the Public Order and Prevention of Crime (Procedure) Rules 1972 (hereinafter called 'the Rules') as shown in exh. 'RAA1' of the affidavit of Rosnah binti Abdul Aziz, the Secretary of the Board in encl. 11, that the C applicant had not indicated in said Form 1 whether he wishes to be represented by counsel at the hearing of his representation before the Board.

[7] I reproduced the relevant part of Form 1 where the applicant D has not indicated whether he wishes to be represented by counsel.

> * Saya bercadang/tidak bercadang untuk hadir dihadapan Lembaga Penasihat
>
> *Saya bercadang/tidak bercadang untuk diwakili oleh Peguambela*
>
> E
>
> (emphasis added)
>
> Saya akan bercakap dengan Lembaga Penasihat dalam bahasa/loghat ... *Tamil*

F **[8]** The applicant should have indicated in Form 1 that he wishes to be represented by counsel by deleting the word 'tidak bercadang' (does not wish) but he has not done so despite the explanation by the Tamil interpreter. The effect of the omission to delete the correct words, it can be assumed that the applicant actually could G not be said to have the wish to be represented by counsel. By that as it may, despite not deleting the correct words in Form 1, the Board at its first hearing on 22 April at the request of the applicant had postponed the hearing to 20 May 2009 to enable the applicant to engage a counsel. It was not a case that as if the Board had H refused the request by the applicant to postpone the hearing to enable him to engage a counsel.

[9] On the issue of second postponement sought by the applicant's counsel, the court is of the view that there was a request I by the applicant's counsel to the Board for a postponement on the ground that the counsel handling the matter, Mr. Suresh

Thanabalasingam would be engaged in a continued criminal trial at the Kuala Lumpur High Court on the appointed day. This was evident from the letters annexed to the affidavit of the applicant (encl. 21) as exh. 'SK1'. The relevant question is whether the Board should have allowed the second postponement sought by the applicant's counsel? The learned counsel for the applicant cited the case of:

i) Shah Alam High Court Criminal application No: 44-14-2008 ie, *Sivanesan a/l Rajandran v. Timbalan Menteri Keselamatan Dalam Negeri & Anors*;

[10] In *Sivanesan a/l Rajandran (supra)* one of the issues raised by the learned counsel before the court was the refusal by the Board to grant a postponement of the hearing. In the letter of reply by the Board the contents gave the impression to the applicant that the postponement would be granted so long as another counsel appearing on behalf of the applicant's counsel is present or the applicant himself applying for the postponement before the Chairman of the Board.

[11] In the case before the court, there was no letter of reply from the Board to indicate whether the postponement would be granted or the applicant himself appearing before the Chairman of the Board and asking for a second postponement.

[12] In this regard the court would like to state that there is nothing to indicate in the Rules that a request for postponement to the Board should be granted as a matter of right. Whilst the Rules do state the right of the applicant to be represented by counsel, but is silence with regard to whether a request for postponement by counsel should be allowed.

[13] In *Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor* [1998] 2 CLJ 749 the court dealt with the issue of postponement made at the hearing without prior notice and struck out the appeal since the counsel for the appellant was not prepared to proceed with the hearing. The court further held as follows:

(1) Postponement is not as a matter of right. It is most improper to pre-empt the decision of the court. In exercising the discretion, the court has to consider the merits of the application. Thus, it is more prudent for counsels to write in to the court at least three days before the hearing of the

A application for postponement. A lack of response from the court must be assumed as a rejection of such an application and consequently, due preparation by counsels to proceed is needful for the hearing. Conversely, if the reasons forwarded are valid and a postponement is granted, the court's time may be utilized to hear other cases.

B

[14] In the instant case although the application for postponement was allegedly made *vide* letter dated 11 May 2009 which was sent by fax. The applicant then sent another letter to the Board on 19 May 2009 the contents therein in gist was a request for C postponement. The respondent however denied receiving the letter sent through fax by the applicant's counsel but acknowledged receipt of the letter dated 19 May 2009 which was a day before the scheduled hearing on 20 May 2009. No reply was sent by the Board, the applicant's counsel should have assumed it as a rejection D of the application for a postponement and due preparation for the hearing should be made.

[15] It is perhaps useful at this juncture to refer to the Legal Profession (Practice and Etiquette) Rules 1978 in particular rr. 6(a) E and 24(a) respectively.

[16] Rule 6(a) states that: An advocate and solicitor shall not accept any brief unless his reasonably certain of being able to appear and represent the client on the required day.

F Rule 24(a) states that: An advocate and solicitor shall make every effort to be ready for trial in the day fixed.

[17] In this regard I wish to quote what Thomson CJ said and was quoted by the Court of Appeal in the case of *Tan Eng Hoe v. Liang* G *Hooi Kiang* [1960] 1 LNS 135 which is as follows:

> Upon the question of adjournment I need only quote from the judgment of Dato' Sir James Thomson CJ in *Palaniappa Chettiar v. Arunasalam Chettiar* FM Civil App No 34/59 dated 23.4.1959 in which the same point was raised before the Court of Appeal: 'With H regard to the refusal to grant an adjournment, it is well settled law that the refusal of an adjournment of a trial is a matter within the discretion of the trial judge and the Court of Appeal will be slow to interfere with his discretion unless it appears that the result of an order refusing the adjournment has been to defeat the rights of the I appellant altogether and to do that which the Court of Appeal is satisfied is an injustice to him(see *Maxwell v. Keun* [1928] 1 KB ...

> *It is wrong to say as is frequently said, that a litigant is entitled to be represented by the counsel of his choice. The true statement is that he is entitled to be represented by counsel of his choice if that counsel is willing and able to represent him.* (emphasis added) Here counsel although no doubt willing was not able to appear. The appellant had known for at least a week and probably longer that the counsel of his choice would be unable to appear and he was not entitled to insist as he attempted to insist that the case should be adjourned until the counsel of his choice was able to appear.

[18] It is the court's view that on the facts of the instant case the learned counsel is clearly in breach of both rules when he accepted the brief to represent the applicant on the day fixed for the hearing. The Board cannot be faulted for taking a tough stand in not allowing the said postponement. Whilst it can be said the applicant has the right to appoint a counsel of his choice to represent him but a request for a postponement is not as a matter of right.

The facts before the court shows that although the Board did not grant a postponement of the hearing on 20 May 2009, the applicant had decided to appear in person at the hearing of his representation and conducted his own case. In this sense the applicant had been given the right to be heard before the Board and consequently there was no procedural non-compliance on this issue.

Second Issue

[19] The learned counsel for the applicant submitted that the request by the applicant to have a short adjournment to enable him to call witnesses such as the recording officer to prove that the statement recorded was not voluntary was refused by the Board. The applicant also alleged that he was unable to furnish the addresses of his witnesses whom he wanted to call. Learned counsel further argued that in encl. 2 of the affidavit in support at para. 32 line 7 the averment that 'Sebelum saya diarahkan keluar, saya telah memohon keizinan untuk memanggil pegawai penyiasat kes saya yang hadir untuk diperiksa balas, namun permohonan saya telah ditolak dengan menyatakan bahawa ia tidak relevan.' There was no affidavit in reply by the respondent to the said averment and following the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 where the court held that where one party makes a positive assertion upon a material fact, failure of his opponent to contradict it is usually treated as an admission by him of the fact

so asserted. The refusal by the respondents to allow the applicant to cross examine the officer who recorded the applicant's statement was a violation of r. 10(2) of the (Procedures) Rules 1972, thus it amounted to procedural non-compliance and in violation of art. 151(1)(a) of the Federal Constitution.

[20] In reply by the learned federal counsel, it was submitted that the Secretary of the Board avers that at no time at all during the hearing of the representation, that the applicant had intimated to the Board that he wishes to seek an adjournment to call witnesses including the recording officer who recorded his statement. It was not within the Board's knowledge that the applicant had wanted to call witnesses during the hearing of the representation and therefore it was an afterthought.

Finding Of The Court On 2nd Issue

[21] Although both parties did not refer to the Federal Court case of *Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2009] 1 CLJ 686 but I find it relevant to the issues raised before the court. In *Lim Wen Jeng*'s case *(supra)* there the Board refused the appellant's third application for postponement to secure the presence of two witnesses. One witness was under restricted residence whilst the other was the investigating officer of the case. The appellant had earlier sent a letter dated 27 November 2007 requesting the Board to exercise its power under s. 9 of the Ordinance to summon the attendance of the two witnesses. On 28 November 2007 the Board had replied the appellant's letter approving his request to call the two witnesses. The Board, however did not invoke its powers under s. 9 of the Ordinance but carbon copied its letter of 28 November 2007 to the relevant police branches. The reasons given by the Secretary of the Board for not invoking s. 9 of the Ordinance was that the Board had short notice of two days as the hearing was fixed on 29 November 2007.

[22] In the case before the court the applicant did not write to the Board that he wishes to cross examine the recording officer who recorded his statements because no such letter was exhibited. Be that as it may even if the applicant did not write to the Board to secure the presence of the recording officer but instead intimated verbally to the Board, the effect in my view is the same. This is because s. 9 of the Ordinance is silent as to the mode to be

adopted when the applicant wishes to secure the presence of a particular witness. That is to say it suffices if it was intimated to the Board as in the instant case. The Secretary of Board on the other hand said that if the applicant had intimated to the Board the name and address of the witness surely the notes of proceeding will reflect so. This however was not so and therefore it could be safely assumed that it was never intimated to the Board.

[23] Assuming it was intimated to the Board, the issue here can the Board be compelled to exercise the power of summoning the recording officer as required by the applicant. In *Lim Wen Jeng*'s case *(supra)* the Federal Court has held that:

> Section 9 of the Ordinance is not a mandatory procedural requirement that the Board can be compelled to exercise the power of summoning the witnesses as required by the appellant. If the appellant wishes to examine any witnesses, he should make them available at the hearing and no obligation can be cast on the Board to summon them.

[24] It would be helpful to reproduce s. 9 and art. 151(1)(a) of the Federal Constitution for easier reference:

> Section 9 reads as follows:
>
> Power to summon witnesses
>
> Every Advisory Board shall, for purposes of this Ordinance, but subject to the provision of section 11, have all the powers of a Court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.
>
> Article 151 provides:
>
> Restrictions on preventive detention
>
> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him on the grounds for his detention and subject to Clause (3), the allegations of fact on which the order is based, and shall give the opportunity of making representations against the order as soon as may be;

A (b)

(2) ...

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national
B interest.

[25] In this respect, the Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. That includes ensuring the proceedings before the
C Board is completed expeditiously and thus refusing an adjournment. The Board may also refuse to call witnesses such as the investigating officer to be cross examined on the written evidence from the victims, witnesses and information which is classified as confidential. On that basis the presence of the applicant may not be
D allowed during the presentation of the facts with regard to the applicant's criminal activities. The presence of the applicant during the presentation of the facts before the Board would tantamount to disclosing the identity of the informer and thus compromise on its secrecy and national security. In *PP v. Karpal Singh Ram Singh & Another Case* [1988] 2 CLJ 587; [1988] 1 CLJ (Rep) 249 Abdul
E Hamid Omar Acting LP had occasion to quote Lord Parker in the case of *'The Zamora'* [1916] 2 AC 77 where the learned Lawlord had said: 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would
F be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public'.

[26] According to r. 10 Public Order and Prevention of Crime
G (Procedure) Rules 1972 which states as follows:

10 (1) Every Board may regulate its own procedure in respect of any matter not expressly provided for by these Rules;

(2) In particular, but without prejudice to the generality of paragraph (1), a Board may in its discretion, having regard to
H consideration of security in the national interest, determine:

(a) whether any witness should or should not be heard in the presence of a detained person and his advocate, or either of them;

I

(b) whether any police officer should not be required to appear before the Board in the presence of a detained person and his advocate, either of them; and

(c) whether any document or other information should or should not be made available or disclosed to a detained person and his advocate, or either of them.

[27] Reverting to the facts of the instant case and on the same principle as enunciated in *Lim Wen Jeng*'s, I am of the view there is no obligation on the part of the Board to secure the presence of the witnesses sought by the applicant to be cross-examined. If the applicant wishes to cross-examine the recording officer, then he should make him available at the hearing which he has not done. However even if the recording officer was present at the hearing, whether the witness could be called to be cross-examined is entirely the discretion of the Board. I therefore find that there was no procedural non compliance on this issue.

The Third Issue

[28] The learned counsel for the applicant challenged the appointment of the Chairman and the two other members of the Board as unqualified persons under art. 151(2) of the Federal Constitution and urged the respondents to furnish documentary proof thereof. It was further submitted that the respondents should exhibit the appointment letter from SPB Yang DiPertuan Agung. The Secretary of the Board according to the applicant had only revealed the particulars of the Chairman but not the particulars of the two other members. It was argued that since the allegation made was specific then there should a specific averment by the respondents and not just 'mention in passing'. Reference was made to the case of *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 where the court held that:

(1) It is for the respondents to prove that the constitutional and statutory safeguards as embodied in art. 151 of the Constitution and s. 6(1) of the Ordinance had been strictly complied with. The liberty of an individual should not be infringed upon without proof that the impugned infringement is in accordance with the Constitution and statute.

(2) Where a party upon whom the onus of proof lies adduces conflicting evidence, a court assessing that evidence is entitle to rule that the burden has not been discharged. Further, in a matter as important as an individual liberty, the detenu is entitled to rely on the version that is most favourable to him.

A (3) The respondents have failed to show that the recommendations of the Advisory Board were made to His Majesty within the three months prescribed by art. 151 and s. 6(1). In these circumstances, *habeas corpus* should have been issued by the High Court.

B **[29]** The short sharp reply by the learned federal counsel, was to rely on an old aged legal maxim that 'one who alleges must prove'. To require the respondents to prove the allegation untrue would tantamount to allowing the applicant to 'going on a fishing expedition'. It is incumbent upon the applicant show proof that the C appointment of the Chairman and the two members of the Board was not in accordance with the Federal Constitution. In this respect the Secretary of the Board in her affidavit affirmed on 28 December 2009 (encl. 24) at para. 9 had stated that appointment of the Chairman and the two other members were legally qualified and in D accordance with art. 151(2) of the Constitution. The appointing instruments of the Chairman and the two other members were privileged documents which could not be divulged.

Finding Of The Court On The 3rd Issue

E **[30]** The court is of the view that the onus is on the applicant to prove that the appointment of the Chairman and the two other members were not in accordance with art. 151(2) of the Constitution. The court's attention is drawn to the applicant's F affidavit in support (encl. 2) para. 34 where the applicant had stated as follows:

> 34. Saya juga percaya sesungguhnya bahawa Lembaga Penasihat yang mendengar representasi saya adalah bukan satu lembaga yang sah dan Pengerusi Lembaga adalah seorang yang tidak berkelayakan G selaras dengan Perkara 151(2) Perlembagaan Persekutuan dan ahli Lembaga juga tidak berkelayakkan selaras dengan peruntukkan yang sama. Saya sesungguhnya percaya surat perlantikkan harus dikemukakan sebagai bukti.

[31] The court is rather perplexed with the averment in the above H paragraph which states that 'Saya juga percaya sesungguhnya' ('I verily believe'). The applicant did not state the source of his belief. In the court's view if the source is not disclosed then the purported belief is based purely on conjecture, without any legal basis and therefore not credible. The court would find that the decision in *SK* I *Tangakaliswaran Krishnan (supra)* is strictly on its own facts in that

it appears to be a sharp conflict in and between the affidavit produced by the respondent in answer to the appellant's application for *habeas corpus*. No consideration was drawn to r. 10 of the Public Order and Prevention of Crime (Procedure) Rules 1972 by the learned judge when he delivered the judgment for the Federal Court. With respect, it is my humble view that, had the learned judge focused his mind to r. 10 of the 1972 Rules, the learned judge would realize that it gives the right to the Board to regulate its own procedure in respect of any matter not provided by the these Rules. Rule 10(2) makes it abundantly clear that the Board may have the discretion having regard to consideration of security in the national interest, determine:

(a) ...

(b) ...

(c) whether any document or other information should or should not be made available or disclosed to a detained person and his advocate, or either of them.

[32] I am of the view that the Board has taken a legal position that to disclose any document or other information to the applicant or his counsel would not be in the national interest and classified as an official secret. In any event, even it is not an official secret, to disclose or to make available the document to the applicant or his counsel is purely within the discretion of the Board and the court has no power to question the exercise of the discretion by the Board. I therefore find that there was no procedural non-compliance on this issue.

The Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 Abdul Hamid Mohamad FCJ (as his lordship then was) delivering the judgment of the court at pp. 921-922 had this to say:

> The Ordinance was amended by the Emergency (Public Order and Prevention of Crime) (Amendment) Act, 1989 (Act A740) which came into force on the 24th August 1989 (Similar amendments were also made to the ISA 1960 and DD (SPM) Act 1985 by Act A739 and Act 738, restricted challenges to detention orders made by the Minister under s. 4(1) of the Ordinance to grounds of non-compliance with any procedural requirement and nothing else.

A His lordship further stated that (at pp 930-931):

> ... In our view, Courts must give effect to the amendments. That being the law, it is the duty of the Courts to apply them. So in a *habeas corpus* application where the detention Order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent sections in s. 4(1) of the Ordinance or, for that matter, the equivalent in sections in ISA 1960 and DD (SPM) Act, 1985, the first thing that the Courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the Courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the Courts to create procedural requirements because it is not the function of the Courts to make laws or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the Courts should consider whether, on the facts, there has been non-compliance ...

[33] In conclusion, and based on the reasons as adumbrated above and in all the circumstances, there are no procedural non-compliance shown by the applicant. The applicant's application (encl. 1) for a writ of *habeas corpus* is hereby dismissed.